

1938

Present : Moseley J. and Keuneman A.J.

DE SILVA v. MARGARET NONA.

156—D. C. Galle, 35,318.

*Prescription—Deed of gift subject to a condition—Donee to gift a half share of the property to his brother—Claim by brother to conveyance—Action to enforce condition.*

Defendant's mother by deed of gift dated March 2, 1923, gifted certain property to him subject, *inter alia*, to the condition that the defendant shall by a valid deed of gift convey one half share of the property to his brother (the original plaintiff) on the latter's arrival from Jamaica.

The plaintiff arrived at Galle in June, 1925, and assumed possession at the entire property.

On May 10, 1935, the plaintiff demanded a conveyance of half share from the defendant, which was refused a few days later.

*Held*, that prescription commenced to run against the plaintiff from the date on which his demand for a conveyance was refused.

*Ismail v. Ismail* (22 N. L. R. 476) followed.

**T**HIS was an action brought by the original plaintiff against the defendant to be declared entitled to certain interests set out in deed P 1 No. 742 which the plaintiff claimed he had acquired by prescription, and for an order that the defendant be compelled to execute deed in his favour for the interests in question. The original plaintiff died pending the action. The learned District Judge gave judgment for the plaintiff.

*N. E. Weerasooria* (with him *E. B. Wikramanayake* and *A. E. R. Corea*), for defendant, appellant.—The deed was to be executed in favour of the original plaintiff "on his arrival at Galle". The original plaintiff arrived at Galle in June, 1925, and took possession of the entirety of the premises in dispute. His right to obtain a deed accrued to him on that date, and the cause of action arose on that date. Demand was made on May 10, 1935, and this was refused on May 13, 1935, whereupon this action was instituted. Plaintiff's action is prescribed. His right arose immediately on his arrival, so that prescription began to run from June, 1925, and his claim is now barred. The cause of action arose when plaintiff could have called upon the defendant to execute a conveyance in his favour, *i.e.*, "on his arrival at Galle" in June, 1925.

The plaintiff also claims a half share of the premises on the footing that he had been in undisturbed and uninterrupted possession for the prescriptive period. No act of ouster has been alleged or proved.

*H. V. Perera, K.C.* (with him *L. A. Rajapakse*), for substituted plaintiffs, respondent.—The deed of gift in favour of the defendant imposed a trust on him, and the claim against him cannot be barred by prescription—sections 96 and 111 of the Trusts Ordinance. Even otherwise, the cause of action arose when the demand for the conveyance was refused. Till then there was no dispute. Prescription did not begin to run till the date of refusal, *i.e.*, May 13, 1935. The cause of action accrued to the plaintiff only when there was an interference with his right to obtain a conveyance. The words "on his arrival" cannot be interpreted literally. They mean "within a reasonable time after his arrival", where there is an obligation to do an act within a reasonable time there is no breach till

refusal, and that is the starting point for the running of the period of prescription—*Ismail v. Ismail*<sup>1</sup>. This case is analogous to that of a person who purchases property on behalf of another who enters into, and remains in possession of the property purchased for him—*Senaratne v. Jane Nona*<sup>2</sup>.

*E. B. Wickramanayake*, in reply.—The deed does not create a trust. This form of donation is one that is well known to the Roman-Dutch law, *Perezius on Donations* 8-55-5. It is a gift with a pact annexed. The law to be applied is therefore the Roman-Dutch law and the English law of Trusts cannot be invoked. The right to enforce the pact accrued on his arrival in Galle. Even if these words are given a liberal interpretation the plaintiff is out of time. The cases cited do not apply. In those cases there was a subsequent agreement between the parties which postponed the cause of action.

*Cur. adv. vult.*

February 7, 1938. KEUNEMAN A.J.—

This action was brought by the original plaintiff against the defendant, (1) to be declared entitled to certain interests set out in deed P 1 No. 742 of March 2, 1923, which the plaintiff claimed that he had acquired by prescription, and (2) for an order that the defendant be ordered to execute a deed in his favour for half the lands in question subject to the covenants and conditions in the deed P 1. Pending action, the original plaintiff died and the present respondent was substituted in his place.

After trial the learned District Judge entered judgment for the plaintiff, ordering the defendant to execute a deed of transfer forthwith in favour of the plaintiff as executrix of her late husband Cornelis' estate in terms of P 1. The defendant was ordered to pay the costs of suit, inclusive of the transfer deed costs.

The facts of the case are as follows :—

By deed of gift P 1, Francina Hamine, the mother of the original plaintiff and the defendant, gifted the premises in question to the defendant, subject to the condition that donee shall by a valid deed of gift grant and convey one half of the premises to the original plaintiff "on his arrival at Galle from Kingston, Jamaica", and subject to further conditions which imposed a *fidei commissum* on these premises if the original plaintiff died without legitimate children. In point of fact the plaintiff died leaving two legitimate children.

The original plaintiff arrived in Galle in June, 1925, and since then assumed possession of the entirety of the premises in question. No demand for the conveyance was made till May 10, 1935. The defendant replied by his letter P 2 of May 13, 1935, refusing the request. The present action was filed on October 5, 1935.

The defendants' Counsel argued that the claim of the plaintiff for a conveyance under the terms of P 1 was prescribed, and that the claim to the half share on the footing of the acquisition of a prescriptive title was not maintainable, as the plaint disclosed no ouster. It was also contended that there was a misjoinder of causes of action. I think, however, that this last contention cannot be sustained in appeal, in view of the fact that the answer does not make such averment, nor is the point distinctly raised in any of the issues.

<sup>1</sup> (1921) 22 N. L. R. 476.

<sup>2</sup> (1913) 3 C. A. C. 83.

The learned District Judge was of opinion that the deed created a trust in favour of the original plaintiff as regards one half of the premises, and Counsel for the respondent supported this finding by reference to section 96 of the Trusts Ordinance. It is, however, not necessary to decide this point. The plaintiff at any rate was entitled under the Roman-Dutch law to enforce by action the pact in his favour, although he was not one of the contracting parties (*vide Perezius on Donations, Bk. VIII, tit. 55, s. 5*). This position is not denied. The only question argued was that the plaintiff's action was prescribed.

As regards that point, great stress was placed on the terms of P 1, which required that the defendant should grant the half share of the premises on the arrival of the plaintiff at Galle from Kingston, Jamaica. Taking into account the fact that the plaintiff may not have known of the existence of the deed P 1, and the fact that something in the nature of acceptance of the terms and conditions of P 1, was required of the plaintiff, I think the meaning of these words is that the conveyance should be made by the defendant to the plaintiff within a reasonable time after the arrival of the plaintiff at Galle. I think the case falls within the decision in *Ismail v. Ismail*<sup>1</sup>, and that prescription runs only from the refusal of the demand for the conveyance. It was also contended that the reasonable time for giving the conveyance has elapsed long since. In this connexion the fact, that the plaintiff was allowed to be in *de facto* possession of the interest in question, can be taken into account—*vide Senaratne v. Jane Nona*<sup>2</sup>. It seems clear that the reasonable time had expired when the demand for the conveyance was made and refused in 1935, but I am not prepared to hold that prescription began to run at any period earlier than that. If that is taken as the date, the plaintiff's action is clearly not prescribed.

In my view, it is unnecessary to consider the other issues and findings in the case. The appeal must be dismissed with costs.

MOSELEY J.—I agree.

*Appeal dismissed.*

